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IN THE

Supreme Court of the United States

October Term, 1966

No. 493

JOSEPH ROBERT RALPH, EUGENE C. LEWIS, AND M. RAY HURST, JR., ET AL.,
Petitioners,

v.

TIDEWATER CONSTRUCTION CORPORATION, A CORPORATION, RAYMOND INTERNATIONAL, INC., A CORPORATION, AND PETER KIEWIT SONS' CO., A CORPORATION, JOINT VENTURERS, TRADING AS TIDEWATER-RAYMOND-KIEWIT, AND MERRITT-CHAPMAN & SCOTT CORPORATION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

OPINIONS BELOW

The administrative ruling of the Administrator of the Wage and Hour and Public Contracts Division, United States Department of Labor, is printed in Petitioners' Appendix B at p. 18.

The oral opinion of the District Court is unreported and is printed in Petitioners' Appendix B at p. 21.

The opinion of the Circuit Court is reported at 361 F. 2d. 806 and is printed in Petitioners' Appendix B at p. 23.

II

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

III

QUESTIONS PRESENTED

1. Was traveling time in boats between shore and work sites during construction of the Chesapeake Bay Bridge Tunnel compensable under the Fair Labor Standards Act in spite of Section 4(a) of the Portal-to-Portal Act?

2. Was such time made "hours worked" by reason of Section 4(b) of the Portal Act?

3. If the answer to either of the first two questions is yes, was Respondents' reliance upon and conformance, in good faith, with a written interpretation of the Wage and Hour Administrator, as found by the jury, a complete defense to this action by reason of Section 10 of the Portal Act?

IV

STATUTES INVOLVED

The relevant provisions of the Fair Labor Standards Act, 29 U.S.C. Section 201, *et seq.* and the Portal Act, 29 U.S.C. Section 251, *et seq.*, are set forth in Petitioners' Appendix A, pp. 11-13. The relevant section of the Portal Act dealing with reliance on administrative rulings, 29 U.S.C. Section 259, is printed as Appendix A hereto, *infra*, p. 8.

V

STATEMENT OF THE CASE

After the Chesapeake Bay Bridge Tunnel was completed, the Petitioners, 69 of the approximately 3000 employees who worked on the project, sued their employers, Respondents, for overtime payment for the time they spent riding in boats between shore and their respective working places before and after working hours. No work was performed in the boats, the employees being free to sleep, read or merely enjoy the ride (pp. 88-91 of Respondents' Appendix to the Circuit Court, hereinafter cited "TRK-MER."). Utilization of this form of transportation was not required by Respondents and as the project progressed some employees drove their private automobiles across and through the completed portion of the bridge-tunnel complex rather than ride in Respondents' personnel boats. (TRK-MER. 95).

At the outset of the project this precise riding time had been the subject of negotiations between Respondents and the Unions which represented Petitioners and the other employees on the project. It was agreed between the parties to these negotiations that in the light of the economic realities of the project, the employees would accept a daily lump-sum payment in lieu of pay for travel time.

Shortly after construction began the Wage and Hour Division conducted an investigation of the pay practices on the project. The Regional Director took the position that although the travel time was not "hours worked" by reason of Section 4(a) of the Portal Act, Respondents had inadvertently made it technically "compensable" by reason of the peculiar language of the collective bargaining agreements providing for daily lump sums. Since the Regional Director's view represented an interpretation of the Portal Act at complete variance with that rendered by Respondents'

Counsel before the negotiations commenced and compliance with it would have resulted in enormous unexpected costs, Respondents asked the Administrator himself, the only official empowered under the Act to issue binding rulings, to rule on the matter. It was made perfectly plain that Respondents would necessarily be governed by the views of the Administrator.

The Administrator agreed with the Regional Director that the travel time was not "hours worked" by reason of Section 4(a) of the Portal Act. But the Administrator did not agree that the contracts had made the travel time "compensable" and he therefore ruled that the Respondents were not in violation of the law. Respondents relied upon the Administrator's ruling.

Three years later at the trial, the District Judge also agreed that the travel time was not "hours worked" by reason of Section 4(a), but thought that the contracts had made the time "compensable" and, therefore, submitted to a jury the question whether the Respondents had in good faith relied upon the Administrator's ruling, admitted by Counsel for Petitioners during the trial in the District Court to be a complete defense to the claim by reason of Section 10 of the Portal Act. The jury promptly found for the Respondents.

On Petitioners' appeal, the Court of Appeals also agreed that the travel time was not "hours worked" by reason of Section 4(a) and in addition agreed with the Administrator that the contracts had not made the time compensable and held the submission of the good faith defense to the jury was harmless error. The judgment for the Respondents was therefore affirmed.

VI.

ARGUMENT

1. The Riding Time Was Made Non-Compensable By Section 4(a) of The Portal Act.

The question of riding time having been so clearly disposed of by the Congress in its choice of language used in and the legislative history of Section 4(a), there is little judicial authority subsequent to the enactment of the Portal Act. But what there is clearly supports the findings of the Courts below that the time spent riding in boats to and from the work sites on the project is not compensable. See *Wirtz* v. *Flint Rig Co.,* 222 F. Supp. 707 (D.C. Mont., 1963) and *D A & S Oil Well Servicing, Inc.* v. *Mitchell,* 262 F. 2d. 552 (10th Cir., 1958). Furthermore, *Steiner* v. *Mitchell,* 350 U.S. 247, cited by Petitioners, actually supports Respondents' contentions, at page 256:

> "We, therefore, conclude that activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act *if* those activities are an integral and indispensable part of the principal activities for which covered workmen are employed *and* are *not* specifically excluded by Section 4(a)(1)." (Emphasis supplied).

Thus, the Regional Director, the Administrator and both Courts below were clearly correct in ruling that the travel to and from the work sites on the bridge-tunnel project was precisely the type of "riding" *expressly made non-compensable* by Section 4(a)(1) of the Portal Act.

2. The Collective Bargaining Agreements Did Not Convert The Riding Time to "Hours Worked."

This question is not, as contended by Counsel for Petitioners, whether the collective bargaining agreements re-

moved the activity from coverage, but whether these agreements, by virtue of Section 4(b)(1) put the riding time back under the Act's provisions.

The parties to the union agreements involved in this litigation understood and agreed that travel time would not be treated as "hours worked" for purposes of the Act. It is clear that they did not intend to make travel time "compensable." Representatives of both the Contractors and the unions so testified. (TRK-MER. 32-33, 61, 102, 112). It is equally clear that such agreements are envisioned by Section 4(b)(1) and (c) of the Portal Act.

Agreements which violate the provisions or purposes of the Act should not be given effect. However, this rule does not apply to agreements to settle the question whether certain activity or non-activity constitutes work or employment where it is not such by statute. *Bowers* v. *Remington Rand, Inc.,* 159 F. 2d. 114 (7th Cir., 1946), *cert. den.* 330 U.S. 843 (1947); *General Electric Co.* v. *Porter,* 208 F. 2d. 805 (9th Cir., 1953) *cert. den.* 347 U.S. 951 (1954). In instant case the question was not whether the Respondents by contract had sought to evade the Act, but whether inadvertently they had by contract made the riding time compensable.

Since the bridge-tunnel project itself was unique and the contract provisions were tailor-made to fit the peculiar conditions prevailing, it is obvious that a Supreme Court construction of these particular contracts would be of interest only to the litigants in this case and would make no significant contribution to the law generally. As a matter of fact, in the 19 years since the Portal Act, only one case can be found, that unreported officially, construing the effect of contract provisions dealing with compensation for time which is not "hours worked" under the statute.

That case, *Gramiak* v. *Pittston Stevedoring Corp.*, 13 WH Cas 17, 30 CCH ¶70,098 (D.C.S.N.Y., 1956), completely accords with the decision of the Administrator and the Circuit Court in this case.

3. Respondents Are Supported by Jury Verdicts That They Relied In Good Faith And In Conformity With A Ruling of The Wage And Hour Administrator.

Counsel for Petitioners conceded in the District Court that reliance in good faith upon and in conformance with a ruling of the Wage and Hour Administrator was a complete defense to the Petitioners' claims by reason of Section 10 of the Portal Act. Nowhere in their Petition for a Writ of Certiorari do Petitioners challenge the verdict of the jury which found for Respondents on this issue. The validity of the defense of Section 10 of the Portal Act has never been questioned by the Courts. See *U. S.* v. *Stocks Lincoln-Mercury, Inc.*, 307 F. 2d. 266 (10th Cir., 1962); *Spring* v. *Washington Glass Co.*, 15 F. Supp. 312 (D.C. WPa., 1957); and *Campbell* v. *Horace F. Wood Auto Livery Co., Inc.*, 12 WH Cas 299, (D.C.S. Ind., 1954).

While the Circuit Court held that Section 10 was inappropriate in this case, the Court concluded that the care and precaution taken by the District Judge in sending the case to the jury was not harmful.

VII

CONCLUSION

This petition involves no important question of federal law as indicated by the dearth of litigation on the points raised. It involves no more than remote issues derived from a peculiar set of facts concerning a unique project, which issues have been correctly determined by the Administrative agency charged by Congress with the duty of enforcing the

Act and the two Courts below. Any further consideration of the abstruse issues raised in this case would not contribute to the extant body of the law. In view of the obvious lack of any general interest in the issues presented in this case, it is respectfully requested that the Respondents be spared further litigation. For these reasons, the writ of certiorari should be denied.

Respectfully submitted,

TIDEWATER CONSTRUCTION CORPORATION, RAYMOND INTERNATIONAL, INC., PETER KIEWIT SONS' COMPANY AND MERRITT-CHAPMAN & SCOTT CORPORATION

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APPENDIX A

Portal-to-Portal Act, Section 10, 29 U.S.C. Section 259:

§ 259. Reliance in future on administrative rulings, etc.

"(a) In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

"(b) The agency referred to in subsection (a) of this section shall be—

"(1) In the case of the Fair Labor Standards Act of 1938, as amended—the Administrator of the Wage and Hour Division of the Department of Labor;"